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8 UNITED STATES DISTRICT COURT  
9 WESTERN DISTRICT OF WASHINGTON  
10 AT TACOMA

11 KIM DIANE KOENIG,

12 Plaintiff,

13 v.

14 CITY OF BAINBRIDGE ISLAND,  
15 BAINBRIDGE ISLAND POLICE  
DEPARTMENT, STEVEN CAIN,

16 Defendants.

CASE NO. C10-5700 RJB

ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANTS'  
MOTION FOR PARTIAL  
SUMMARY JUDGMENT

17 This matter comes before the Court on Defendants' motion for partial summary judgment.  
18 Dkt. 27. The Court has considered the pleadings in support and in opposition to the motion and  
19 the record herein.

20 **INTRODUCTION AND BACKGROUND**

21 This civil rights action arises out of the detention and arrest of Plaintiff Kim Diane  
22 Koenig (Koenig) for obstructing a police investigation concerning her husband for a possible  
23 driving under the influence violation. Dkt. 1. Koenig asserts that she was falsely arrested and  
24 physically and sexually assaulted by Bainbridge Island Police Officer Steven Cain (Cain). *Id.*, at

1 pp. 2. Koenig claims that the municipal defendants, City of Bainbridge Island and the  
2 Bainbridge Island Police Department, ratified the unconstitutional acts of Officer Cain. *Id.*, at pp.  
3 3-4. Koenig also claims the municipal defendants negligently hired, trained, supervised, and  
4 retained Officer Cain. *Id.* Koenig asserts a cause of action under 42 USC § 1983 for the  
5 Defendants' violation of Koenig's civil and constitutional rights, "including her right to free  
6 speech, right to be free of unreasonable searches and seizures, right to liberty, right to be free of  
7 false arrest and detention, right to privacy, right to bodily integrity, right to be free of false and  
8 defamatory accusations." *Id.*, at 2. Koenig asserts state law causes of action, including  
9 negligence, defamation, false arrest and imprisonment, assault, and negligent and intentional  
10 infliction of emotional distress. *Id.*

11 Defendants seek summary judgment dismissal of claims related to the legality of Koenig's  
12 arrest, violation of First Amendment rights, defamation, and all municipal liability claims  
13 (negligent hiring, training and supervision, custom or policy and ratification). Dkt. 27.  
14 Defendants do not seek dismissal of Koenig's sexual assault and excessive force claims against  
15 Officer Cain. Dkt. 33.pp. 13.

16 The following facts are construed in Keonig's favor for the purposes of this motion for  
17 summary judgment. Plaintiff Kim Koenig and her husband, John Muenster, are attorneys  
18 licensed to practice law in the State of Washington. Dkt. 32 pp. 6-7, 27-29. On the evening of  
19 September 29, 2007, Koenig and Muenster attended a party at the Filipino Community Hall on  
20 Bainbridge Island. Dkt. 32 pp. 8, 30. Koenig did not have any alcohol at the party but had  
21 consumed "one scotch on the rocks" prior to arrival at the party. Dkt. 32 pp. 8. Muenster  
22 consumed two glasses of red wine at the Community Hall. Dkt. 32 pp. 30.

1 At about midnight, the couple left the Community Hall to go home, with Muenster  
2 driving and Koenig in the front passenger's seat. Dkt. 32 pp. 32-33. They turned onto Sportsman  
3 Road and Muenster observed a police car. Dkt. 32 pp.33. Muenster noticed a 30 mph speed limit  
4 sign and realized the speed limit had recently changed from his current speed of 40 mph to 30  
5 mph. *Id.* When the police car put on its red lights, Muenster believed he was being pulled over  
6 for speeding. *Id.* He pulled the car over to the shoulder and was approached by Bainbridge  
7 Island Police Officer Richard Christopher. Dkt. 28 pp. 4, Dkt. 32 pp. 33-34. Christopher noticed  
8 a strong odor of intoxicants coming from the vehicle. Dkt. 28 pp. 4. Christopher asked the driver  
9 where he was coming from and how much he had to drink. Dkt. 28 pp. 4. Muenster replied that  
10 they were coming from a party and that he had consumed two drinks. *Id.*, Dkt 32 pp. 37.  
11 Muenster supplied Christopher with his driver's license, vehicle registration and insurance. Dkt  
12 28 pp. 4. Christopher states in his Incident/Investigation Report that he observed the passenger  
13 (Koenig) slumped forward and leaning against the front passenger door. He reported that she  
14 had a vacant look on her face and that she appeared to be flushed. Dkt. 28 pp. 5. Koenig and  
15 Muenster dispute this characterization of Koenig, stating that she was alert and articulate. Dkt.  
16 32 pp. 35-36.

17 Christopher asked Muenster if he would mind taking a couple of voluntary tests to help  
18 Christopher determine his ability to drive safely. Dkt. 28 pp. 5. Muenster said he wanted to talk  
19 with an attorney, that the female passenger was his wife, Kim Koenig, and that she was an  
20 attorney. He asked her what he should do. She told him that he should remain silent, exercise  
21 his rights and not take any tests. Dkt. 28 pp. 5, Dkt. 32 pp. 10, 37. Christopher stated that her  
22 speech was slurred and that she sounded intoxicated. Dkt. 28 pp. 5. Muenster then stated to  
23 Officer Christopher that he would not take any tests. *Id.* Christopher asked Muenster to exit the  
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1 vehicle so he could determine if the odor of intoxicants was coming from Muenster or his wife.  
2 *Id.* Once out of the car, Muenster again stated to Christopher that he wanted his wife to represent  
3 him. Dkt. 32 pp. 38. Koenig also exited the vehicle with the intention of advising her husband  
4 and observing what transpired. Dkt. 28 pp. 5, Dkt. 32 pp. 10-11, 38. Officer Christopher told  
5 Koenig to get back into the vehicle. Dkt. 28 pp. 5, Dkt. 32 pp. 11. He stated that Koenig was  
6 very loud and that her husband had asked her to represent him and she wished to provide legal  
7 advice. Dkt. 28 pp. 5. Christopher then requested that both Muenster and Koenig get back into  
8 their vehicle. Dkt. 28 pp. 5. He explained that he did not know them and that for his safety he  
9 would not permit them both to be outside the vehicle while he investigated and that he would call  
10 for backup. Dkt. 28 pp. 5, Dkt. 32 pp. 11, 39-40. Muenster and Koenig got back in their vehicle  
11 and waited a several minutes for another officer to arrive. Dkt. 28 pp. 5, Dkt. 32 pp. 14.

12 Bainbridge Island Police Officer Steven Cain arrived on the scene. Dkt. 28 pp. 5.  
13 Christopher then re-contacted Muenster and asked him to exit the vehicle. *Id.* Muenster and  
14 Koenig state that he informed both of them that they could now exit their vehicle. Dkt. 32 pp.  
15 13. Both Muenster and Koenig exited the vehicle. Dkt. 28 pp. 7. Dkt. 32 pp. 13.

16 Officer Cain's version of the events are recorded in his Incident/Investigation Report, and  
17 is as follows:

18 Immediately after the male exited, the female passenger got out of the passenger side of  
19 the car. I asked her to please remain in the car. She said, "I'm his attorney!" I again  
20 asked her to please stay in the car. She refused, saying "I don't have to; he's asked for an  
21 attorney!" She had a strong odor of intoxicating beverage on her breath, had bloodshot  
22 eyes and had slurred speech. She was swaying when she stood up and held onto the open  
23 car door. I believed her to be intoxicated.

24 I told her that if she insisted in getting out of the car, then she needed to stay right next to  
the open passenger door and that if she attempted to interfere with the other officer's  
investigation, she would be arrested for obstructing an officer. I asked her if she  
understood. She said that she did, but that she was his attorney. She immediately yelled  
toward Officer Christopher who was speaking with the man and said, "Don't say

1 anything!" I again told her to stay there and not to interrupt the officer any more or she  
2 would be arrested.

3 I moved away from the vehicle's passenger door and toward the rear of the car to cover  
4 Officer Christopher while he spoke with the driver. For a short time the female remained  
5 at the open passenger door, watching. She then walked directly toward Officer  
6 Christopher and the man, physically closed the gap. She walked right up to Officer  
7 Christopher, continuing to try to talk with her husband, saying, "You don't have to say  
8 anything to him!"

9 I advised her that she was now under arrest for obstructing an officer. I told her to turn  
10 around so that I may place handcuffs on her. She refused to turn around, so I moved  
11 behind her and placed the handcuffs on her. I advised CenCom that I had one in custody.  
12 The time was 0012 hrs. I began escorting the woman toward my patrol car by using the  
13 escort position of holding her left arm/elbow with my hand; however she refused to move  
14 more than about two steps and stopped. I asked her, "Do you understand that you are  
15 under arrest?" She said, "But I'm his attorney!" She then began screaming for the man to  
16 help her. She attempted to escape me by lunging back toward the man. I had to tighten  
17 my grip on her arm/elbow to keep control of her. She refused to walk forward and I told  
18 her, "Just walk with me!" She was continually screaming and pulling against me and  
19 lunging in different directions. I finally had to pull her along with me, since she refused  
20 to walk.

21 I opened the rear door of the police vehicle and told her to get inside; however she  
22 refused to sit down. She stiffened up even more and was screaming at me to let go of her  
23 arm. She again was pushing and shoving against me. I placed her against the side of the  
24 trunk area holding her in place with my hip while I used my free hand and radioed for  
another unit to come. She screamed, "He's dry humping me!" I again told her to sit down  
in the back seat but she refused. I pulled down on her left elbow while pushing down on  
her upper back and she finally sat down.

Dkt. 28 pp. 7.

Koenig and Muenster dispute much of Officer Cain's version of what transpired. Koenig  
testified in her deposition that as she exited the vehicle, Officer Cain came running at her, yelling  
for her to get back into the car. Dkt. 32 pp. 14-16. Muenster testified in his deposition that he  
saw Officer Cain running toward the location of his wife on the passenger side of their vehicle.  
Dkt. 32 pp. 41. Koenig testified that she initially did not get back into the car as she was trying  
to explain to Officer Cain that she was an attorney representing her husband and wanted to  
observe and take notes. Dkt. 32 pp. 16. Muenster stated it was almost immediately that he

1 heard Cain inform his wife that she was under arrest. Dkt. 32 pp. 42. Koenig stated that she did  
2 not offer any resistance to the arrest. Dkt. 32 pp. 21. Koenig testifies that Cain grabbed her very  
3 forcibly and threw her on the top of the hood of their car. Koenig stated that Cain got on top of  
4 her and handcuffed her and yanked her down off the car. Koenig testified that Cain then began  
5 whipping her handcuffed hands up toward the back of her head. Dkt. 32 pp. 19. Koenig testified  
6 that Cain made it impossible for her to walk as he kept throwing her off balance and caused her  
7 to fall. *Id.* Instead of letting her get in the patrol car, Koenig testified that Cain threw her on top  
8 of the back end of his car and began dry humping her while she screamed for help. Dkt. 32 pp.  
9 23. Koenig testified that Cain then choked Koenig until she involuntarily defecated in her pants.  
10 *Id.* It was only then that he put her in the patrol car. *Id.*

11 Koenig and Muenster were transported to the police station, issued citations, and  
12 released. Muenster was issued a citation for negligent driving and notice of infraction for  
13 speeding. Dkt. 28 pp. 6. Koenig was issued a citation for obstructing an officer and resisting  
14 arrest. Dkt. 28 pp. 24. Apparently, the Kitsap County Prosecutor declined to prosecute on any  
15 of the charges. Dkt. 31 pp. 7.

16 Koenig filed a complaint with the City of Bainbridge regarding Officer Cain's conduct.  
17 Dkt. 28 pp. 20. The Bainbridge Island Police Chief assigned the criminal investigation of  
18 Plaintiff's allegations to the Puyallup Police Department. Dkt. 28 pp. 20. The Mercer Island  
19 Police Department investigated whether Cain violated any internal department policies. Dkt. 21-  
20 24. The Puyallup investigation found no evidence of a crime, and the Mercer Island  
21 investigation exonerated Officer Cain. Dkt. 28 pp. 20-24. The Bainbridge Island Police  
22 Department Chief, Matt Haney, sent notification to Koenig that the two outside agency  
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1 investigations“determined the allegations be classified as Unsubstantiated.” Dkt. 32 pp. 54. Chief  
2 Haney stated:“I agree with these findings.” *Id.*

3 Koenig subsequently learned that Cain was subject to a previous allegation of sexual  
4 impropriety while employed as police officer in 1991. Dkt. 32 pp. 60-64. An investigation of  
5 this allegation of sexual assault against Officer Cain was deemed unsubstantiated. Dkt. 30 pp.  
6 1-3. The investigation determined that Officer Cain took time off duty to engage in an  
7 adulterous affair with the complainant. *Id.* Nonetheless, due to his lack of poor judgment, Cain  
8 was demoted from his supervisor position as acting patrol sergeant to that of patrol officer. *Id.*

9 Defendants have filed a declaration of Sergeant Tom Owens of the Seattle Police  
10 Department. Sergeant Owens has 20 years of service as a police officer and has been a police  
11 instructor for 18 years. Officer Owens reviewed the incident reports, the deposition of Koenig  
12 and the complaint. It is his opinion that under the conditions present at the traffic stop, Officer  
13 Cain followed standard police practices and performed in a manner of a reasonable police officer  
14 when he arrested Koenig for obstruction for failing to return to the vehicle. Dkt. 29 pp. 1-6.

### 15 SUMMARY JUDGMENT STANDARDS

16 Summary judgment is proper only if the pleadings, the discovery and disclosure materials  
17 on file, and any affidavits show that there is no genuine issue as to any material fact and that the  
18 movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party is  
19 entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient  
20 showing on an essential element of a claim in the case on which the nonmoving party has the  
21 burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985). There is no genuine issue  
22 of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find  
23 for the non moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586  
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1 (1986)(nonmoving party must present specific, significant probative evidence, not simply“some  
2 metaphysical doubt.”). See also Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a  
3 material fact exists if there is sufficient evidence supporting the claimed factual dispute,  
4 requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty*  
5 *Lobby, Inc.*, 477 .S. 242, 253 (1986); *T.W. Elec. Service Inc. v. Pacific Electrical Contractors*  
6 *Association*, 809 F.2d 626, 630 (9th Cir. 1987).

7 The determination of the existence of a material fact is often a close question. The court  
8 must resolve any factual issues of controversy in favor of the nonmoving party only when the  
9 facts specifically attested by that party contradict facts specifically attested by the moving party.  
10 The nonmoving party may not merely state that it will discredit the moving party’s evidence at  
11 trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elect.*  
12 *Service Inc.*, 809 F.2d at 630. Conclusory, non specific statements in affidavits are not  
13 sufficient, and“missing facts”will not be“presumed.” *Lujan v. National Wildlife Federation*, 497  
14 U.S. 871, 888-89 (1990).

15 Defendants readily concede that Koenig’s sexual assault and excessive force claims  
16 against Officer Cain must be evaluated by a jury. Dkt. 33 pp. 13.

#### 17 FALSE ARREST CLAIM AND OBSTRUCTION OF AN OFFICER

18 Defendants seek of dismissal of Koenig’s constitutional claim under 42 U.S.C. §1983 for  
19 unlawful arrest and the state law claims for false arrest and false imprisonment. A reasonable  
20 arrest is one supported by probable cause. *Brinegar v. United States*, 338 U.S. 160, 175 (1949).  
21 Under federal law, probable cause exists where the facts and circumstances within the officers'  
22 knowledge and of which they had reasonably trustworthy information are sufficient in  
23 themselves to warrant a person of reasonable caution in the belief that an offense has been or is  
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1 being committed. *Id.* at 175-76. Probable cause is an objective standard, which looks to the  
2 totality of the circumstances known to the officers at the time of the arrest. *United States v.*  
3 *Smith*, 790 F.2d 789, 792 (9th Cir. 1986). Probable cause is a complete defense to false arrest  
4 claims under both the Fourth Amendment and state law. See *McBride v. Walla Walla County*,  
5 95 Wn. App. 33, 975 P.2d 1029 (1999). In a false arrest action, the rule is that “unless the  
6 evidence conclusively and without contradiction establishes the lawfulness of the arrest, it is a  
7 question of fact for the jury to determine whether an arresting officer acted with probable cause.”  
8 *McBride v. Walla Walla County*, 95 Wn.App. 33, 38, 975 P.2d 1029 (1999); *Gurno v. Town of*  
9 *LaConner*, 65 Wn.App. 218, 223, 828 P.2d 49 (1992).

10 A person is guilty of obstructing a law enforcement officer if the person willfully  
11 hinders, delays, or obstructs any law enforcement officer in the discharge of his or her official  
12 powers or duties. RCW 9A.76.020(1). The essential elements of obstructing a law enforcement  
13 officer are (1) that the action or inaction in fact hinders, delays, or obstructs; (2) that the  
14 hindrance, delay, or obstruction be of a public servant in the midst of discharging his official  
15 powers or duties; (3) that the defendant knows that the public servant is discharging his duties;  
16 and (4) that the defendant knowingly does the action or inaction. *Id.*, *State v. Contreras*, 92  
17 Wn.App. 307, 315-16, 966 P.2d 915 (1998).

18 The failure to respond with alacrity to police orders does not constitute obstruction.  
19 *Mackinney v. Nielsen*, 69 F.3d 1002, 1007-1008 (1995). Upon stopping a vehicle for a traffic  
20 violation, a police officer may order passengers into or out of the vehicle only if the officer is  
21 able to articulate an objective rationale predicated specifically on safety concerns. *State v.*  
22 *Reynolds*, 144 Wn.2d 282, 288, 27 P.3d 200 (2001). The circumstances at the scene of the stop  
23 determine whether such an articulable, objective rationale exists. Factors to be considered in  
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1 determining whether an officer may direct a passenger at a traffic stop to exit or remain in the  
2 vehicle include, but are not limited to, the number of officers, the number of vehicle occupants,  
3 the behavior of the occupants, the time of day, the location of the stop, traffic at the scene,  
4 affected citizens, or officer knowledge of the occupants. *Id.*, *State v. Mendez*, 137 Wn.2d 208,  
5 220-21, 970 P.2d 722 (1999), *overruled in part on other grounds by Brendlin v. California*, 551  
6 U.S. 249 (2007).

7 In support of their motion for partial summary judgment, Defendants have provided the  
8 declaration of Tom Ovens, a law enforcement officer with extensive experience, Based upon  
9 Ovens' review of the incident reports, deposition of Koenig and the complaint, it is his opinion  
10 that under the conditions present at the traffic stop, Cain had probable cause to arrest Koenig for  
11 obstructing an officer, and that Officer Cain followed standard police practices and performed in  
12 a manner of a reasonable police officer when he arrested Koenig.

13 This declaration is of little assistance to the Court, because Ovens construed the facts  
14 most favorably for his clients, the Defendants. Disputed facts must be construed in favor of the  
15 nonmoving party, Koenig.

16 Although it is undisputed that this traffic stop occurred on a darkened rural road, there  
17 also was a lack of any traffic that would add to safety concerns. Koenig identified herself to  
18 Officer Christopher that she was as an attorney and asked to give advice to Muenster. Muenster  
19 also advised Christopher that his passenger was his wife and an attorney and that he wanted her  
20 advice. Both Koenig and Muenster peaceably complied with Officer Christopher's order that  
21 they both return to their vehicle while he awaited the arrival of a back up officer (Cain). Koenig  
22 advised both Christopher and Cain, when he arrived, that she wanted to stand outside the car to  
23 observe the interrogation, take notes and be available to act as Muenster's counsel. Contrary to  
24

1 the assertions of the police officers, Koenig and Muenster testify that Koenig was not intoxicated  
2 and that she was not approaching Officer Christopher at the time she was arrested by Officer  
3 Christopher. Accordingly, these facts are disputed and must be construed in favor of the non-  
4 moving party, Koenig.

5 In *Wilson v. Kittoe*, 337 F.3d 392 (4th Cir. 2003), the Fourth Circuit found that a police  
6 officer lacked probable cause to believe that an attorney violated Virginia's obstruction of justice  
7 statute when he refused to obey an officer's three orders to leave the scene of the arrest of a  
8 neighbor. The attorney attempted to engage the officer in conversation, and the attorney inquired  
9 into the well-being of the arrestee, offered his legal services, and peacefully attempted to remind  
10 officer of his neighbor's constitutional rights. The attorney was at all times composed, polite,  
11 remained at a distance and never attempted to approach either officer or arrestee. *Id.*, at 399-404.

12 As in *Wilson*, here there is a genuine issue of material fact as to whether Koenig's actions,  
13 or inaction, hindered, delayed, or obstructed the DUI investigation of Muenster. Defendants are  
14 not entitled to summary judgment on the 42 U.S.C. § 1983 claim for unlawful arrest in violation  
15 of the Fourth Amendment or the state law claims for false arrest.

### 16 **QUALIFIED IMMUNITY**

17 Defendants assert that Officer Cain is entitled to qualified immunity because "Plaintiffs  
18 admitted refusal to comply with Officer Cain's repeated, reasonable commands provided him a  
19 reasonable belief that Plaintiff was obstructing the ongoing investigation." Dkt. 27 pp. 13.

20 The doctrine of qualified immunity protects government officials from liability for civil  
21 damages insofar as their conduct does not violate clearly established statutory or constitutional  
22 rights of which a reasonable person would have known. *Pearson v. Callahan*, 555 U.S. 223, 231  
23 (2009).

1 Here, Koenig had a clearly established constitutional right to be free from an unlawful  
2 arrest. As previously determined, the issue of whether there existed probable cause to make an  
3 arrest is a question of fact for the jury. Construing the disputed facts favorably for Koenig, her  
4 conduct would not warrant a prudent person, or one of reasonable caution, in believing that  
5 Koenig was committing a violation of the obstruction statute. See *Wilson v. Kittoe*, 337 F.3d 392  
6 (4th Cir. 2003)(police officer is not entitled to qualified immunity when officer did not have  
7 probable cause to believe that attorney was obstructing an officer while engaged in an arrest).  
8 Officer Cain is not entitled to qualified immunity at this stage because there are disputed issues  
9 of fact as to whether probable cause existed to make an arrest.

#### 10 MUNICIPAL LIABILITY

11 Defendants seek dismissal of all municipal liability claims.

12 Pursuant to *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978), a public  
13 entity defendant cannot be held liable under a theory of *respondeat superior*; rather, a defendant  
14 must act as a lawmaker or one “whose edicts may fairly be said to represent official policy.” *Id.*, at  
15 693. A plaintiff may establish the policy, practice, or custom requirement for municipal liability  
16 under 42 U.S.C § 1983 through proof that (1) a public entity employee committed the alleged  
17 constitutional violation pursuant to a formal policy or a longstanding practice or custom, which  
18 constitutes the standard operating procedure of the local government entity; or (2) an official  
19 with final policy-making authority ratified a subordinate's unconstitutional decision or action.  
20 *Avalos v. Baca*, 596 F.3d 583, 587-88 (9th 2010).

1       **Custom and Practice.**

2       Koenig argues that the City of Bainbridge Island's failure to terminate Officer Cain, in  
3 light of his history of sexual misconduct while on duty, proximately caused Koenig's  
4 constitutional deprivations. Dkt. 31 pp. 23-24.

5       This claim lacks a factual basis and is subject to dismissal. Koenig's allegation of a prior  
6 incident of sexual misconduct is not only premised on hearsay, it is contradicted by undisputed  
7 evidence that Officer Cain was disciplined for the incident and that this conduct (an adulterous  
8 affair in 1991) has no correlation to the alleged misconduct in the present action.

9       **Ratification.**

10       Koenig asserts that the City of Bainbridge Island ratified Officer Cain's misconduct,  
11 evidenced by the fact it approved the results of the investigation, failed to conduct additional  
12 investigations, and failed to reprimand and discipline Officer Cain. Dkt. 31 pp. 20.

13       A municipality may be held liable for a constitutional violation under the theory of  
14 ratification if an authorized policymaker approves a subordinate's decision and the basis for it.  
15 *Lytle v. Carl*, 382 F.3d 978, 987 (9th Cir. 2004). A mere failure to overrule a subordinate's  
16 actions, without more, is insufficient to support a claim. *Id.*, at 987. The policymaker must  
17 have knowledge of the constitutional violation and must make a conscious, affirmative choice to  
18 ratify the conduct at issue. *Id.*; *Haugen v. Brosseau*, 351 F.3d 372, 393 (9th Cir. 2003),  
19 overruled on other grounds by *Brousseau v. Haugen*, 543 U.S. 194 (2004).

20       In *Haugen*, a case where an officer (Haugen) shot a suspect who was attempting to drive  
21 away in his jeep, the Ninth Circuit held that there were no facts in the record to "suggest that the  
22 single failure to discipline Haugen rises to the level of such a ratification." *Id.* at 393. In other  
23 words, in order for there to be ratification, there must be "something more" than a single failure to  
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1 discipline or the fact that a policymaker concluded that the defendant officer's actions were in  
2 keeping with the applicable policies and procedures. *Kanae v. Hodson*, 294 F.Supp.2d 1179,  
3 1191 (D. Hawaii 2003). As aptly explained by the court in *Kanae*:

4       The law does not say that every failure to discipline an officer who has shot someone is  
5 evidence of a “whitewash” policy or some other policy of “sham” investigations. The law  
6 does not say that, whenever an investigative group accepts an officer's version over a  
7 victim's differing version, this acceptance establishes a policy for which a municipality  
may be held liable under § 1983. If that were the law, counties might as well never  
conduct internal investigations and might as well always admit liability. But that is not  
the law. The law clearly requires “something more.”

8 *Id.* at 1191. See also *Peterson v. City of Forth Worth Texas*, 588 F.3d 838, 848 (5th Cir. 2009)  
9 (holding that there was no ratification of use of excessive force where the Chief of Police  
10 determined after investigation that the officers complied with department policies); *Santiago v.*  
11 *Fenton*, 891 F.2d 373, 382 (1st Cir.1989)(holding that the failure of a police department to  
12 discipline in a specific instance is not an adequate basis for municipal liability under a  
13 ratification theory).

14       In *Larez v. City of Los Angeles*, 946 F.2d 630 (9th Cir. 1991), the Ninth Circuit held that  
15 there was sufficient evidence to support the jury's finding that the Chief of Police ratified the  
16 excessive use of force against the plaintiffs. The “something more” that was present in *Larez* was  
17 an obviously flawed investigation of plaintiff's excessive force complaint. The investigation was  
18 conducted by the unit responsible for the alleged constitutional violation and contained holes and  
19 inconsistencies “that should have been visible to any reasonable police administrator.” *Id.*, at 647.  
20 The Chief of Police did not question the investigation but, rather, accepted the results. *Id.*, at  
21 635. The unreliability of LAPD investigations was further highlighted by a two-year study of  
22 LAPD complaints which showed that it was “almost impossible for a police officer to suffer  
23 discipline as a result of a complaint lodged by a citizen.” *Id.*, at 647.

1 Of a similar vein is *Fuller v. City of Oakland*, 47 F.3d 1522, 1534 (9th Cir.1995), in  
2 which the Ninth Circuit concluded that municipal liability by ratification could attach where the  
3 chief of police reviewed and approved of an investigation allegedly performed in a sexually-  
4 biased fashion because the “grossly inadequate investigation” contained “glaring deficiencies.” *Id.*, at  
5 1535.

6 Extreme factual situations may also support a finding of ratification as a result of a  
7 policymaker's failure to discipline. *Peterson v. City of Forth Worth Texas*, 588 F.3d 838, 848  
8 (5th Cir. 2009). For example, in *Grandstaff v. City of Borger*, 767 F.2d 161 (5th Cir.1985), a  
9 case where police officers “poured their gunfire” at the truck and into the person of an innocent  
10 bystander, the Fifth Circuit held that based on the fact that no discharges or reprimands followed  
11 this “episode of such dangerous recklessness,” the jury was entitled to conclude that it was  
12 accepted as the way things are done and have been done in the City of Borger.” *Id.* at 171.

13 Here, there are no extreme facts or special circumstances that support a finding of  
14 ratification. The Bainbridge Island Police Department Chief, Matt Haney, sent notification to  
15 Koenig that the two outside agency investigations “determined the allegations be classified as  
16 Unsubstantiated.” Dkt. 32 pp. 54. Based on this information, Chief Haney stated: “I agree with  
17 these findings.” *Id.* Chief Haney’s agreement with the independent findings that the allegations  
18 were “unsubstantiated,” does not rise to the level of ratification of Cain’s alleged unconstitutional  
19 conduct. In other words, Chief Haney did not ratify unconstitutional or wrongful conduct; he  
20 ratified conduct he reasonably believed to be appropriate under the circumstances.

21 Koenig’s 42 U.S.C. § 1983 claim premised on ratification is subject to dismissal.  
22

### 23 **State Law Negligence Claims**

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1 Koenig asserts state law claims against the municipal defendants for negligent hiring,  
2 training and supervision of Officer Cain. Dkt. 1 pp. 4-5.

3 In order to establish negligence, Koenig must demonstrate that the Defendants knew, or  
4 in the exercise of reasonable care should have known, that Officer Cain presented a risk of  
5 danger to others. See *Niece v. Elm View Group Home*, 131 Wn.2d 39, 929 P.2d 240 (1997).  
6 Koenig has presented no admissible evidence to support her negligent hiring, supervision or  
7 training claims.

8 Koenig's state law municipal liability claims are subject to dismissal.

### 9 **FIRST AMENDMENT CLAIM**

10 The First Amendment protects a significant amount of verbal criticism and challenge  
11 directed at police officers. See *Houston v. Hill*, 482 U.S. 451, 461 (1987); *Duran v. Douglas*,  
12 904 F.2d 1372, 1377 (9th Cir. 1990). The First Amendment forbids government officials from  
13 retaliating against individuals for speaking out. *Hartman v. Moore*, 547 U.S. 250, 256 (2006);  
14 see also *Gibson v. United States*, 781 F.2d 1334, 1338 (9th Cir. 1986). Accordingly, a law  
15 enforcement officer who arrests a person in retaliation for being insulted or challenged violates  
16 the arrestee's First Amendment rights. *City of Houston v. Hill*, 482 U.S. at 451, 462-63 (1987);  
17 *Duran v. City of Douglas*, 904 F.2d 1372, 1377-78 (9th Cir. 1990).

18 A claim under 42 U.S.C. § 1983 for retaliatory arrest for the exercise of such conduct has  
19 three elements: (1) the plaintiff engaged in activity that is constitutionally protected; (2) as a  
20 result, he was subjected to adverse action by the defendant that would chill a person of ordinary  
21 firmness from continuing to engage in the protected activity; and (3) there was a substantial  
22 causal relationship between the constitutionally protected activity and the adverse action. *Blair*  
23 *v. Bethel Sch. Dist.*, 608 F.3d 540, 543 (9th Cir. 2010). If a plaintiff can prove that the official  
24



secured her arrest without probable cause and was motivated by retaliation against plaintiffs protected speech, the plaintiffs First Amendment claim can go forward. *Beck v. City of Upland*, 527 F.3d 853, 863 (9th Cir. 2008).

Considering the disputed facts in favor of Koenig, there is sufficient evidence to show that Officer Cain's motivation in the arrest of Koenig was to silence Koenig and deprive her of free speech rights to challenge the police actions. Although Cain announced that he was placing Koenig under arrest for obstruction of an officer, a reasonable jury could find, based on the record before the Court, that Cain was, at least in part, punishing Koenig for challenging his authority. Summary judgment should be denied on Koenig's First Amendment claim as to Officer Cain.

## DEFAMATION CLAIM

Koenig's defamation claim states that Officer Cain filed a false and defamatory police report to cover up the true events of October 1, 2007. Dkt. 1 pp. 3. She further claims that Defendants published false and defamatory statements about Plaintiff, including that she was drunk, that she obstructed and resisted arrest. Dkt. 1 pp. 5.

In a defamation case, the plaintiff must establish four elements: falsity, an unprivileged publication, fault, and damages. *Momah v. Bharti*, 144 Wn.App. 731, 739, 182 P.3d 455 (2008); *LaMon v. City of Westport*, 44 Wn.App. 664, 667, 723 P.2d 470 (1986).

Defendants assert that there was no unprivileged publication. First in regard to Officer Cain's Incident/Investigation report, a there exists a qualified privilege based on a common interest in the subject matter being communicated between Officer Cain and the Bainbridge Island Police Department. See *Moe v. Wise*, 97 Wn.App. 950, 957-58, 989 P.2d 1148 (1999).

1 While the qualified privilege generally protects a speaker from liability for statements  
2 that might otherwise be considered defamatory, the privilege is lost if the plaintiff can show by  
3 clear and convincing evidence that it was abused. *Bender v. City of Seattle*, 99 Wn.2d 582, 600-  
4 01, 664 P.2d 492 (1983). A plaintiff can establish abuse of the qualified privilege if the  
5 defendant:

6 (1) knows the matter to be false or acts in reckless disregard as to its truth or  
7 falsity, (2) does not act for the purpose of protecting the interest that is the  
8 reason for the existence of the privilege, (3) knowingly publishes the matter to  
9 a person to whom its publication is not otherwise privileged, (4) does not  
reasonably believe the matter to be necessary to accomplish the purpose for  
which the privilege is given, or (5) publishes unprivileged as well as  
privileged matter.

10 *Moe*, 97 Wn.App. at 963 (citations omitted).

11 Here, to defeat the qualified privilege, Koenig must produce evidence that Officer Cain  
12 knowingly published the defamatory matter to a person to whom its publication was not  
13 otherwise privileged. No such evidence has been presented.

14 Addressing the defamation claims against the municipal defendants, Koenig has not come  
15 forth with any evidence that these Defendants made any defamatory communications to persons  
16 to whom its publication is not otherwise privileged.

17 Defendants are entitled to summary judgment dismissal of Koenig's defamation claims.

## 18 CONCLUSION

19 The Court, having considered the motion, response, reply, and relevant documents herein,  
20 finds the municipal defendants, City of Bainbridge Island and the Bainbridge Island Police  
21 Department, are entitled to summary judgment as to all causes of action asserted against these  
22 entities. Defendant Steven Cain is entitled to dismissal of the defamation claim only.

23 Therefore, it is hereby **ORDERED**:  
24

- 1 1. Defendants' Motion for Partial Summary Judgment (Dkt. 27) is **GRANTED IN**  
2 **PART AND DENIED IN PART.**
- 3 2. All causes of action, federal and state, asserted against the City Bainbridge Island and  
4 Bainbridge Island Police Department, are **DISMISSED WITH PREJUDICE.** The  
5 defamation action against Defendant Steven Cain is **DISMISSED WITH**  
6 **PREJUDICE.**
- 7 3. The causes of action asserted against Defendant Steven Cain under 42 U.S.C. § 1983  
8 for unlawful arrest and detention Under the Fourth Amendment and violation of free  
9 speech under the First Amendment may proceed to trial. The state tort claims against  
10 Defendant Steven Cain, excluding defamation, may proceed to trial.

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12 Dated this 25th day of August, 2011.

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15 ROBERT J. BRYAN  
16 United States District Judge  
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